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A

# New-Years-Gift

FOR THE

# Anti-Prerogative-Men:

OR,

A Lawyers Opinion, in Defence of His Majesties Power-Royal, of granting Pardons, as he pleases.

Wherein is more particularly discussed the validity of the E. of *D*'s Pardon, by way of Letter to a Friend.

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*Seneca* to the Emperour.

*Occidere contra Legem nemo potest, servare nemo præter te*

*Bracton.* lib. 1. c. 8. de Corona.

*Rex potestatem habet jucondi de vita & membris, vel tol. lendi vitam, vel concedendi.*

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# A
# New-Years-Gift
## FOR THE
## Anti-Prerogative-Men, &c.

*SIR,*

YOurs I have received, and read, wherein you are pleaſed to intimate to me, that you are now very well ſatiſfied in your mind, by reading over thoſe ſeveral Pieces I ſent you, touching the Right, that my Lords, the Biſhops claim to judge in Capital Cauſes in Parliament, as likewiſe the unreaſonableneſs of excluding his Royal Highneſs, the Duke of York, from the Succeſſion to the Imperial Crown of *England*; But there is yet (ſay you) a third ſcruple remaining on you; And that is about the validity of the E. of *D*'s Pardon; where-

fore you are very desirous to know of me (seeing there is nothing hitherto purposely written on that Subject) whether I think that same Pardon good; and in case I do, you expect I should give you some Reasons why I do so.

I must tell you, that 'tis contrary to my humour to ingage my self in such kind of Controversies at any time, but more especially at this instant; you have ever known me (like your self) a great Admirer of that Principle, we commonly call *Self-preservation.* However in obedience to your command, and to satisfie that obligation, which lies on me (so far as I can) to vindicate Truth, and the Father of our Countrey, in His Prerogative-Royal, I shall not value the sleeping (as they say) in a whole Skin, but shall endeavour to say something, which may not be impertinent, towards the Conviction of *Anti-Prerogative-Men*, and your own satisfaction. And in order thereunto, I think it convenient to shew you,

1. What a Pardon is.

2. By whom, and in whose Name only, all Pardons are made.

3. What things his Majesty may, and what he may not pardon.

4.

4. Who is Judge of the validity, and invalidity of a Pardon, when pleaded in the House of Lords, or elsewhere.

And in the last place I shall give you my Sentiments in particular, concerning the Pardon, granted to the E. of *D.* together with Solutions to some Objections that have been made in Coffee-Houses.

A Pardon (says Sir *Edward Coke*) is a work of Mercy, whereby the King either before Attiander, Sentence, or Conviction, or after, forgiveth any Crime, Offence, Punishment, Execution, Right, Title, Debt, or Duty, Temporal, or Ecclesiastical. Or,

A Pardon (say others) is the remitting, or forgiving, any offence committed, *contra dignitatem & Coronam Regis.* Agreeable to that of *Seneca, Venia est pœnæ meritæ remissio*: So that *Liberatio a pœna*, is the proper effect of a Pardon, and it differs from a Dispensation thus; a Dispensation obtained, doth *Jus dare* and make the thing prohibited, lawful to be done by the Party who hath it; But a Pardon frees from the punishment due for a thing unlawfully done, yet freedom from punishment is a consequent of a Dispensation, though not its ef-

fect, as 'tis most ingeniously observed by the late Lord Chief Justice *Vaughan*.

In the next place I am to consider whose Prerogative it is to grant Pardons. This surely none can challenge but the King, in whom is vested the Soveraign and Supreme Authority of the Nation; this I will make good by way of Syllogism.

He, in whom is vested the Soveraign and Supreme Authority of the Nation, hath power of Life and Death;

But in the King is vested the Soveraign and Supreme Authority of the Nation: *Ergo*,

The King only has power of Life, & Death.

Curtius; *Et cùm in regali solio residebis, vitæ, necisq; omnium Civium Dominus.*

Zouch's Elements part. 4. sect. 4. *Ad Majestatem spectat potestas vitæ, ac necis, cùm solus Princeps primariò habet Jus Gladii.*

The Major Proposition I prove thus; *Jus Gladii*, Power of Life and Death, is an essential, and inseparable attribute of the Soveraign and Supreme Authority (for where there is not *Jus vitæ & necis*, there can be no Supreme Power,) *Ergo* he, in whom is vested the Soveraign Power, has power of Life and Death.

As for the Minor Proposition, I presume no body (except a Popeling or a Whig,) but will grant that our King is Supreme Governour

nour of this Realm, and all other his Dominions, seeing our Authentick Laws and Statutes do so expresly and so often say it.

All (says *Bracton*) are under the King, and the King is under God only; He hath no equal in his Realm (no Co-ordination here) because then he could not Command all, for amongst Equals there can be no Empire, Therefore much less are any his Superiours, or can challenge greater Power, because then he would be under his Subjects; and *Inferiores pares esse non possunt potentioribus. Ipse autem Rex non debet esse sub homine sed sub Deo.* *Bracton, lib. 1. c. 8. num. 5.*

*Rex* (says Mr. *Cambden*) *supremam potestatem, & merum imperium apud nos habet, nec in imperii clientela est, nec investituram ab alio quovis accipit, nec præter Deum, superiorem agnoscit.* The King hath Sovereign Power, and Absolute Command among us, neither holdeth he his Empire in Vassalage, nor receiveth his Investiture or Installing of another, nor yet acknowledgeth any Superiour but God alone.

By the Statutes of 24 *H.* 8. *c.* 12. 25 *H.* 8. *c.* 21. 1 *Eliz. c.* 1. & 1 *Jac. c.* 1. the Crown of this Kingdom is affirmed to be an Imperial

perial Crown and what an Empire is, Sir *Edward Ridley* will give you a clear Demonstration.

Part. 2. cap. 2. sect. 7. View of the Civil and Ecclesiastical Law.

"By the Empire (says that most Learned Civilian) I understand not only the Empire of *Rome*, but also every several Kingdom, which acknowledgeth no other Emperour than his own Sovereign; for howsoever they differ in Name and Title, yet is the Office it self all one; for every one is Gods immediate Vicar upon Earth, in their own Kingdoms, for Matters appertaining to Justice.

But further, In our Oath of Supremacy we Swear, that the King is the only Supreme Governour: Supreme, so none (not the Pope) above him: And only Supreme, so none has any Co-equal, Co-ordinate, Corrival power with his Soveraignty. But it has been heretofore said by some Huntscrap Statists, That the Oath of Supremacy is taken in opposition to the Pope, to exclude the Supremacy usurped by that old Gentleman for many years. 'Tis truth they speak, but surely not all the Truth; for there are two Points in it;

The

The one, that is Negative, whereby we profeſs, that not any Foreign State, or Potentate, nor the Pope hath this Power: The other Poſitive, by which the Subject of this Power is ſpecified. The Kings Highneſs is the only Supreme Governour of this Realm, as in all Spiritual things and Cauſes, ſo likewiſe in Temporal matters: Both Eccleſiaſtical and Civil Supremacy are in this Oath aſſerted to be in the King. It was not thought ſufficient to tell who was not Supreme, but to declare alſo who was.

So that now (Sir) you may perceive that by our known Laws our King is Inveſted with ſuch a Supremacy as excludes both Pope and People, from having any Power, Juriſdiction, or Authority over him; And if ſo, then certainly we may conclude that he who has Veſted in him the Sovereign Power, has alſo *Vitæ ac necis Authoritatem*, the ſole power of Life and Death, to ſave or deſtroy, as well to pardon as to puniſh Offenders.

Next come I to conſider what Offences the King (as Supreme Governour of this Realm) can pardon or remit, and what he cannot as to Temporal matters.

In the first place I shall shew you what things the King cannot pardon, according to the Laws of *England*; as for example,

11 R. 2. Chr. 17. 2 R. 3. 8. Co. 3. Inst. f. 237.

In an Appeal of Death, Robbery, Rape, *&c.* the King cannot pardon the Defendant, for the Appeal is the Suit of the Party, to have Revenge by Death; and whether the Defendant be attainted by Judgment, *&c.* or by Outlawry, the Kings Pardon shall not discharge the Defendant.

13 E. 4, 5. a. Co. 3. Inst. 237.

So in an Attaint by *A.* against the Party, and the Petit Jury against the party to have Restitution; this the King cannot pardon.

Co. 3. Inst. 237. c. 20. 2 part Dewell. v. Saunders. Davis Rep 75. a. b. Vaughans Rep. Thomas v. Sorrel.

So the King cannot pardon Nuzances, that are (not transient but) continuing, as a Nuzance in *Viâ Regiâ*, that still continues and is not ended, until removed; and so of a Water-course diverted, or Bridge broken down, they cannot be pardoned, so as to acquit the Nuzance-maker, for Committing them.

Vaughans Rep. Edw. Thomas. v. Sorrel.

So a Mayor of a Town, or other Toll-taker, who is penally bound to provide the Market-Measures, and doth not, cannot be pardoned by the King, because the fault still continues.

So

So if one be bound in a Recognizance to the King, to keep the Peace againſt another by name, and generally all other Subjects of the King; In this Caſe before the peace be broken, the King cannot pardon or releaſe the Recognizance, although it be made only to him, becauſe it is for the benefit, and ſafety of his Subjects. 1 *H.* 7. 10. 11 *H.* 7. 12. Co. 3. *Inſt.* 238.

So after an Action popular be brought, *Tam pro Domino Rege quam pro ſeipſo*, according to any ſtatute, the King cannot diſcharge the Informers part, becauſe by bringing of the Action, the Party hath an Intereſt therein. 1 *H.* 7. 3. a. Co. 3. *Inſt.* 194, 195, 238.

Come I now (*Sir*) to demonſtrate what Offences the King can pardon by the Law of *England*.

If a Man Arreſted for Felony, break *Priſon*, he loſes his Battel, but if the King pardon that breaking of *Priſon*, the Defendant ſhall be reſtored to the Battel, and the Counterplea taken away. Co. 3. *Inſt.* 237. Hobarts *Reports* Cuddington *v.* Wilkins *f.* 82.

So in divers caſes at the *Suit* of the *Party*, when the Defendant either by the Common Law, or by any Statute (beſides the reſtitution or damage of the *Party*, *Plaintiff*) is thereby alſo to have exemplary puniſh-

ment, the King may pardon the ſame; as firſt, for inſtance at the Common-Law.

In an Attaint by *A*, againſt the party and the Petit Jury; againſt the party to have reſtitution, this (as is ſaid before) the King may not pardon: Againſt the Petit Jury, by the Common-Law, *That they ſhould loſe* Liberam Legem, *their Wives and Children caſt out of their Houſes; their Houſes waſted, their Trees proſtrated, their Meadows ploughed up, their Goods and Chattels ſeized, and their Bodies taken*, This the King may pardon; becauſe it is a puniſhment, exemplary to deter others, and tendeth not to the reſtitution or ſatisfaction of the Plaintiff.

*Co. 3. Inſt.* 237.

Now to offer Inſtances upon Statute-Law. The Defendant in an Appeal of Murder, upon Not Guilty pleaded, was found Guilty of Man-ſlaughter: And it was reſolved by the Judges upon Conference betwixt them, That the Queen may pardon the burning of the Hand, for that is no part of the Judgment at the Suit of the Party Plaintiff in the Appeal, but it is a collateral, and exemplary puniſhment inflicted by the Statute of 4 *H.* 7. *c.* 13.

*Co. lib.* 5. *f.* 50. Buggins *Caſe.*
*Co.* 3. *Inſt.* 237.
Hobarts *Rep. f.* 294.
Searle *v.* Williams.

So upon the Statute of *Weſtm.* 2. *c.* 25. that

*Co.* 3. *Inſt. f.* 171, 237.

that giveth two years Impriſonment, in a Raviſhment of Ward, the King may pardon the ſaid corporal puniſhment of Impriſonment.

So upon the Statute of *Weſtm. c.* 20. *De Malefactoribus in parcis*, the Damages concern the *P*laintiff, and therefore the Kings pardon cannot diſpenſe with them; but the Ranſome, the finding of Surety, and the forjuring the Realm, are puniſhments exemplary, and concern the King, and therefore he may pardon the ſame. 15 Eliz. Dyer 323. 9 Eliz. Dyer 269. *Co.* 2. *Inſt.* 200.

So there is a Clauſe in the Statute of 5 *Eliz. c.* 14. That the *P*laintiff ſhall not releaſe nor diſcontinue the puniſhment, *&c.* but only Coſts and Damages: and yet it was reſolved, that the Queen might pardon the corporal puniſhment, that doth trench to common example. 15 Eliz. Dyer 322. Taverners *Caſe*, Co. 3. *Inſt.* 171.

So before any Action popular brought, the King may diſcharge the whole, becauſe the Informer cannot bring an Action or Information originally for his part only, but muſt purſue the Statute. 1 H. 7. 3. Co. 3. *Inſt.* 194, 195, 238. 37 H. 6. 4.

So the breaking the Aſſize of Bread and Ale, the foreſtalling the Market, Ingroſſing, Regrating, or the like, which continue not, but Vaughans *Reports*, Edward Thomas *v.* Sorrel.

but are over as ſoon as done, until done *de novo* may be pardoned by the King; ſo as the Offender ſhall not be Impleaded for them, otherwiſe than by perſons that have received particular damage, which the King cannot remit.

Vaughans *Reports*, Edward Thomas *v.* Sorrel.

To conclude; Although the King cannot acquit Nuzance-Makers for committing Nuzances, yet the Fine or puniſhment impoſed for the doing them, may be pardoned by the King.

Thus (*Sir*) having given you a true extent and latitude of his Majeſties pardoning *Power*, that is to ſay, what the King may, and what he cannot pardon, relating to matters Temporal, I come to the next particular propoſed in the beginning, And that was to ſhew, who ought to be Judge and Interpreter of Pardons granted by the King, as to the validity or invalidity of them, when pleaded in the high Court of Parliament.

That with the Soveraign Prince, reſideth the prime and ſupreme Power of interpreting of his own Laws, Reſcripts and Grants, cannot be denied; for both the Common and

Civil

Civil Law Profeſſors do affirm, *That in doubtful and obſcure points, the interpretation and will of the Prince is to be expected, ſince it is his part to interpret, who made the Law or Grant.*

Bracton *lib.* 2. *c.* 16. *num.* 3. Fleta *lib.* 3. *c.* 14. *num.* 4. *D.* 28. 6. 43. *D.* 50. 17. 191. *c.* 1. 14. 12. 1. Princeps conditor, & interpres Legum unicus.

Now our King as the ſupreme Legiſlator and interpreter, has communicated this his Authority to ſome particular perſons, for the interpreting and expounding his Laws, and Grants; And the reaſon why he has ſo delegated this power to them, is rendred by *Forteſcue* thus; *You ſhall better* (ſays he to *H.* 6.) *execute Judgment by others, than by your ſelf; neither hath it been ſeen that any King of* England *hath pronounced Judgment with his own mouth.* The former part of *Forteſcue*'s words are Orthodox, but the latter part are not ſo: If the famous Antiquary, Mr. *Selden*, may be credited; for he in his Notes *ad cap.* 8. of *Forteſcue* affirms, that Kings themſelves often ſate in Court, in the Kings-Bench: and in the Rolls of Charters under King *John*, and the time near him, often occur Grants that ſuch or ſuch Engliſh ſhould not be Impleaded, or put to Anſwer, *niſi coram nobis, vel Capitali Juſtitia noſtra*, and to *Normans*, *niſi coram nobis, vel Capitali*

*Capitali Seneſchallo noſtro.* Here *coram Capitali Juſtitia* is divided from *coram Rege*, the laſt ſignifying before the Kings perſon; although now Pleas held in the Kings-Bench before the Succeſſor of the *Capitalis Juſtitia*, are entred *coram Rege:* But *è diverticulo in viam*, we will return to the point propoſed, and ſhew you who are the competent Judges of the validity or invalidity of a Pardon pleaded in the houſe of Lords. In order thereto we muſt diſtinguiſh betwixt matters moved in the upper Houſe of Parliament, that concern the Cuſtoms and Priviledges thereof, and thoſe matters that purely concern the common and Statute Laws of the Realm.

That Kings have in former times perſonally ſate in the Kings-Bench. *Vide* Co. Litt. 71. *b.* Cambdens Britannia *in* Engl. *f.* 178. *Sir* Henry Woottons *Hiſt. of Chriſtendom, f.* 213. Co. 4. *Inſt.* 73.

Co. 4. *Inſt. f.* 15. Co. *lib.* 13. *f.* 63.

The former muſt be determined adjudged and diſcuſſed by the courſe of *Parliament*, and not by the Civil Law, nor yet by the Common Laws of this Realm, uſed in more inferiour Courts; which was ſo declared to be *ſecundum Legem & conſuetudinem Parliamenti*, concerning the *Peers* of the Realm, by the King, and all the Lords Spiritual and Temporal; and the like *pari ratione* is for the Commons, for any thing moved, or done in the Houſe of Commons.

But on the other ſide, if any queſtion ariſeth

riſeth meerly upon the Common or Statute Law, the Judges of *England* are to give their Opinions, when ever it be demanded by the Lords, in their Houſe; as for inſtance, if a Pardon be pleaded by a Peer, or any other perſon there, and 'tis doubted whether it be good or not in Law: This *Query* (I humbly conceive) muſt be referred by the Lords to the Kings Juſtices for their ſolution.

*Vide Sir* Robert Filmers *Patriarcha*, where you may ſee, of what Authority the Opinion of the Judges hath been in Parliaments.

And as all the Judges, or the majority of them ſhall declare themſelves, (*pro* or *con*) the Lords of Parliament, are wont uſually to determine and give ſentence accordingly; But if the queſtion be, whether the manner and circumſtances, that attend ſuch a Pardon, be valid or not, by the Cuſtom and Law of *P*arliament, then the Lords of *P*arliament themſelves, are ſolely to decide the doubt, without any Reference to the Opinion of the Judges, for they are not to intermeddle with any Matters of *P*arliament, and ſo have they in ſeveral *P*arliaments confeſſed.

*Vide* Cottons *Collect. f.* 651. 31 *H.* 6. *num.* 27.

This (Sir) may ſuffice as to the fourth particular by me propounded, and now I haſten to the laſt point of all, and that is to

conſider of the E. of *D*'s Caſe in particular, but before I ſhall handle it, I muſt tell you this, That where-ever I have or ſhall mention *P*eers or Lords of *P*arliament, I intend as well the Lords Spiritual as the Lords Temporal; for I am very well ſatisfied now, (as I underſtand you are) that the Lords Spiritual have as much Right, in virtue of their Temporal Baronies to ſit in Capital Caſes, as the Temporal Lords can pretend to, and I am verily perſuaded, that there was never any Criminal Cauſe handled in *P*arliament, where the Lords Spiritual did not ſit either perſonally, or by *P*roxy; And if not one of theſe ways, yet undoubtedly they upon their withdrawing, ever entred their *P*roteſtation for the ſaving of that ſame Right and *P*riviledge. And ſo I now come to treat of the validity of the E. of *D*'s *P*ardon.

And I take this (*P*ardon me if I miſtake) to be his Caſe.

E. of D's Caſe.

*The E. of* D. *is impeached before the Lords, by the* Commons *of* England, *of High Treaſon, and of ſeveral other miſdemeanors; But before any further proceeding in proof of the Charge againſt him, His Majeſty diſſolves that Parliament, and*

*and upon the diſſolution thereof, the King grants to the E. of* D. *a Pardon of all Treaſons and Miſdemeanours whatſoever; And then His Majeſty calls another Parliament, whereat the* Commoners *exhibit new Articles of the ſame Treaſons and Miſdemeanors againſt the ſaid Earl; whereupon he pleads the ſaid Pardon to this ſecond Impeachment in the Houſe of Lords.*

Now the Queſtion will be, whether this Pardon be good or not? The Reſolution whereof will depend on an Anſwer given to this Query following: *viz.* *The Query.*

Whether his Majeſty, by virtue of his Prerogative-Royal can pardon, in the interval of two Parliaments, thoſe Crimes, whereof the E. of *D.* was impeached in the former Parliament?

I humbly conceive, That his Majeſty can by His Prerogative-Royal, grant ſuch a Pardon. I preſume it will be admitted, that had this Pardon been purchaſed before any Impeachment in Parliament, it had been good; But the granting of it, after Arti-

cles exhibited in the Houſe of Lords, makes the doubt, which I ſhall endeavour thus to clear.

The *Commons*, 'tis true, as the general Inquiſitors of the Realm, have authority from the King, to examine any Crime, be it Treaſon, Felony, Oppreſſion, Bribery, Extortion, or the like, committed by a Lord of Parliament, Spiritual or Temporal; and if they find by the Vote of the Houſe, the Charge to be true, they have power to tranſmit the ſame to the Lords, with the Witneſſes and Proof.

As for the Peers, they are the Supreme Court of Judicature in this Nation, not only to judge whether matters preſented to their Lordſhips by the Commoners, be fit or requiſite for the King to paſs into Laws, but alſo of Writs of Error, and of Matters of Fact, either not determinable in other Courts, yet in regard of nicety or ſpecial Matter, they cannot well diſcern or judge.

*Vide Cottons Tower Records.* Moreover to theſe Lords of Parliament belongeth a power (and that derived from the Crown)

Crown) of giving Judgments in Caſes of Treaſon, of Impeachments for ſeveral Crimes, of Slanders of Peers, of Breaches of Priviledges, both upon Peers and Commons, together with Capital Cenſures of Beheading, Hanging Drawing, Quartering, Impriſonment, Baniſhment, Fine and Forfeiture both of Lands, Goods and Offices inflicted on Offenders.

Now theſe two, The Lords and Commons, I mean, are convened by the Kings Writs, to aſſiſt him with their Advice in difficult and weighty Matters, relating to Church and State; And in ſo doing they eaſe their Soveraign Lord of much Labour, but do not thereby deprive him of any one Tittle of Royal-Power. *They may* (ſays the moſt glorious Royal Martyr) *remember, that at beſt they ſit in Parliament as my Subjects, not my Superiours; called to be my Counſellors not Dictators: Their Summons extends to recommend their Advice, and not to command my Duty.*

You muſt know, that by calling a Parliament (which is but a Meeting of the King

King and his Subjects, (and ſuch they continue as well collectively as they were before ſingly,) and a Meeting in its own nature diſſolvable at pleaſure) the King is not grown leſs, or departed with any thing either by way of Abdication or Communication of the ſoveraign Power that is veſted in him, as King of *England*. That were indeed to make more than one Soveraign in a Kingdom; a thing altogether inconſiſtent with Supremacy and Monarchy: So that the Soveraignty muſt be totally in the King, and where that is there muſt be *Gladii poteſtas*, the power of Life and Death, a Right as well of pardoning as of puniſhing Offenders. Like as divers other things do ſolely belong to the King, as Prerogatives incident to His Imperial Crown and Royal Dignity, whereof the Subject hath nothing to do, as the power of Calling, Holding, Proroguing and Diſſolving of Parliaments, of advancing to Honours, Offices and Commands; of raiſing of Armies, of entring into Leagues and Treaties, of Founding Corporations, Guilds and Fraternities, of coyning of Money, of making Letters of Denization, to whom and how many

many he will; Together with many other things that appertain to His Majesty as special Flowers of His Crown.

The King of *England* (I must confess) may limit himself by Promise or Contract in Parliament (as he hath been pleased to restrain himself from the use of that power, which makes new Laws and repeals old, without the consent of the Lords and Commons in Parliament, as likewise from raising Money upon the Subject without their consent) not to pardon the Offences of such Persons as are before Impeach'd in the High Court of Parliament, without the consent of his two Houses, or the like: But then I must demand, that such a Grant be produced; let it be made appear by an authentick Record, that the King of *England* has done so; And when such a Record is shewn, I shall be as ready to plead against the validity of the E. of *D*'s Pardon, as I do now for it; Till then I desire to be excused. Besides, 'tis not enough to affirm, That there cannot be found any President in the Parliament Rolls, wherein any Peer of the Realm has been pardoned by the King,

King, after an Impeachment has been tranſmitted to the Lords by the Commons; but a Preſident muſt be offered to prove, That a Pardon has been adjudged void, where it has been pleaded by a Peer in a later, that was charged with High Treaſon in a former Parliament.

But further yet (Sir) If the King can under his Great-Seal command all Proceſs, and proceedings in Criminal Cauſes to ceaſe againſt one accuſed before in Parliament, then ſure, what ſhould hinder, but the King may pardon ſuch a one? For a diſcharge of any further proceeding againſt ſuch a one directed to the Judges, and their Award thereon, *That the Party accuſed ſhall go, ſine die*, is equivalent to a Pardon under the Broad-Seal of *England*, now that there hath been ſuch a kind of diſcharge, and thereon an Award given by the Judges in the Kings-Bench to that purpoſe, I will make good by this Record following.

Paſch. 4. 7 E. 3. Coram Rege Rot. 53. Co. 3. *Inſt.* 239.

*Steven Graveſend*, Biſhop of *London*, was accuſed in *P*arliament, for adherency to *Edmond* Earl of *Kent* in his Treaſons, where by

by Order of *P*arliament the matter was referred to the Kings-Bench to be tryed, where the Biſhop pleaded Not-Guilty, and afterwards was diſcharged by the Kings Writ under the Great-Seal, directed to the Judges of the Kings-Bench, to this effect.

*Licet venerabilis Pater* Stephanus, London *Epiſcopus, per breve noſtrum coram nobis ad ſectam noſtram implacitetur de eo, quod ipſi* Edmundo *nuper Comiti* Kantiæ *adhæſiſſe debuerat: Quia tamen prædict. Epiſcopus de adhæſione, prædict. omnino immunem reputamus; vobis mandamus, quod placito prædict. coram nobis ulterius tenen. omnino ſuperſedeatis.*

*Teſte meipſo apud* Weſtm. 12 *die* Decembr. *Anno Regni noſtri* 4.

The Award of the Court that is given thereupon, is very remarkable, *viz.*

*Cujus brevis prætextu conſideratum eſt, quod prædictus Epiſcopus eat inde ſine die, &c. Et ulterius non proceda-tur verſus eum.*

Sir *Edward Coke* upon this ſame Record comments thus;

*This man, it may be thought, that the taking of the Pardon ſhould be an implyed Confeſſion of the Fault, and therefore went a new way: but no man that is wiſe, and well adviſed will refuſe God and the Kings Pardon, how often ſoever he may have it; for there is no man but offendeth God, and the King almoſt every day, and the Pardon is the ſafeſt and ſureſt way.*

Out of this notable Preſident, and the Comment of Sir *Edward Coke* thereon, we may make theſe ſeveral Remarques.

Firſt

First, That though *Steven Graveſend* was charged with High Treaſon before in Parliament, yet the Judges of the Kings-Bench, upon the Kings Writ to them directed under the Broad-Seal, did award, that the ſaid *Steven* ſhould go *ſine die*; *Et ulterius non procedatur verſus eum.*

Secondly, That this ſame Award was given by the Judges, before any Sentence or Judgment paſſed, either by themſelves, or by the Lords in Parliament.

Thirdly, That if this manner of proceeding with *Steven Graveſend* had been contrary to the Laws and Cuſtoms of Parliament, the Lords and Commons would no doubt have diſputed the Kings Prerogative in this Caſe; And I cannot learn out of any Antiquary, or Hiſtorian, that this ſame Biſhop of *London* was ever queſtioned afterwards in Parliament, or the Kings-Bench Judges for thus obeying the Kings Writ.

Fourthly, That if this manner of proceeding

ceeding in *Graveſend's* Caſe be valid in Law (as it is, otherwiſe my Lord *Coke* would have told us ſo) then a *Fortiori*, the Kings granting a Pardon to the E. of *D.* muſt be much more; For *Coke* ſays, that a Pardon is the ſafeſt and ſureſt way. So that we may conclude, That either way is good, though that of a Pardon be the ſafeſt and ſureſt. Is not a Fine and Common Recovery the ſafeſt Conveyance for the paſſing of Lands. And yet a Tranſlation by Feoffment, by Bargain and Sale, *&c.* is a good Conveyance, though not the ſafeſt and ſureſt.

In a word, Sir *Edward Coke* does not at all intimate unto us, that either way is illegal, but only gives the Biſhop a Reprimende for his Impudence, in not embracing the beſt expedient, when he had the choice of two.

Sir, If what I have ſaid in defence of the E. of *D*'s Pardon, give you any ſatisfaction, I ſhall be glad; But now I think on't, my Papers will be the more welcome, if I return you Solutions to thoſe Objections that have been ſtarted at Coffee-Houſes, and indeed mentioned in your Letter. The

*Objections and Solutions.*

The first Objection is, say you, a notable distinction, made betwixt Offences committed against the Crown, and Offences perpetrated against the State or Common-wealth; the former the King may pardon, but by no means the latter.

I answer, That this is a distinction without any diversity; For I affirm, that whatsoever is done against the State or Common-wealth, is done against the Crown, *Et è contra.* I am sure in all Monarchical Governments, the learned Sir *Henry Hobart* in his Reports, tells us, *That the King and the Common-wealth, make but one*; *That the King is the Head of the Common-wealth, and the Reformation of all general wrongs belongs to him*; And, *Cujus est condemnare, punire, ejus est absolvere, ignoscere*; *Qui damnare potest* (says the Civil-Law Text) *is absolvendi quoque potestatem habet.* And therefore in all our Indictments, it is said, That such a thing was done, *Contra dignitatem & Coronam Regis*; But I never read, that such a thing was perpetrated *Contra rem publicam*, or *statum populi Anglicani*, unless it were in the

Hobarts *Reports f.* 342. Sheffields *Case.*

*Idem*, Cuddington *v.* Wilkins.

the late Uſurpation, when this our glorious, antient and hereditary Monarchy was turned into a Democratick Slavery, under the Title of *The Common-wealth of* England. I ſhall further add, to what I have already ſaid, towards the utter confuſion of this diſtinction, *viz.*

That His Majeſty can by virtue of His Royal-Power, either before Attainder, Sentence or Conviction, or after, pardon all Crimes whatſoever, and remit all puniſhments, exemplary, to deter others, and not tending to the ſatisfaction or ſafety of particular Perſons. In ſhort; he can pardon all manner of Crimes, that are tranſient, and not continuing before Sentence, or Conviction; And if the E. of *D.* be guilty of ſuch Offences as are permanent and continuing, pray let the *Anti-Prerogative-Men* name them, and in ſo doing they will very much oblige the World. All this our Books of Law are ready to make good, as you have read before in this Diſcourſe.

But then it may be replied, That although the King can pardon any Crime (be it Treaſon

ſon, Felony, Bribery, *Perjury*, Extortion or the like) before Attainder, *Sentence* or Conviction, or after; yet if an Impeachment be once lodged in the Lords Houſe againſt any *Perſon*, that *Perſon* cannot be pardoned, until he be convicted, and hath received *Sentence*.

To this I rejoyn thus; It muſt be granted me, as I have ſaid before, that if the E. of *D.* had procured the Kings *Pardon*, before any Articles had been by the Commoners exhibited againſt him, the *Pardon* had been good; And why it ſhould not be ſo afterwards paſſeth my comprehenſion; For the Impeachment in Parliament does neither alter the nature of the Crimes, nor is the Kings Power of pardoning any way leſſened thereby; the Crimes are the ſame after an Accuſation in Parliament, as they were before, they are, nor greater, nor leſſer, Treaſon is Treaſon, Felony is Felony, and the like of other Offences; And as for the Regal-Authority in granting Pardons, it continues the ſame as well after as before; the King of *England* being as free and abſolute a Monarch, in a Seſſion of Parliament as

as out of it, which no able Juriſt, I am confident, will deny.

Thus much in anſwer to your firſt Objection.

Your other Objection is this, That the E. of *D*'s Pardon is not valid in Law; becauſe it is but a *Stamp*-Patent by Creation, having not paſſed the *Seals*, as *Statute*-Law requires.

As to this Objection, I give you this Anſwer; There are but two Statutes (if I miſtake not) that preſcribe a Courſe or Form, for paſſing things under the Kings Seals.

The one of theſe ſame Statutes is the 13 *R.* 2. *c.* 1. how Charters of *P*ardon ought to paſs; wherein it is provided:

1. That in a *P*ardon for Murder, Treaſon, Rape, *&c.* The Offence committed, ſhall be ſpecified, and if there be not ſuch a ſpecification, the Charter muſt be diſallowed, I ſuppoſe, the E. of *D*'s *P*ardon is not defective in this point.

2.

2. That no *P*ardon of Treaſon or Felony ſhall paſs without Warrant of the *P*rivy-Seal, together with a Forfeiture of him, at whoſe *S*uit ſuch a *P*ardon is obtained. This latter clauſe is wholly Repealed, and annulled by the *16 R.* 2. *c.* 6. And therefore it affects not the E. of *D*'s *P*ardon at all.

The other Statute is the 27 *H.* 8. *c.* 11. wherein is ſet down the courſe of ſuing forth Grants under the Kings Sign Manual, *&c.* Now if this Statute doth extend to Charters of *P*ardon as it doth to other Grants (which perhaps may be ſo, becauſe every *P*ardon is a Grant from the King, yet neither of them (be it Charters of *P*ardon, or other Grants) are declared *ipſo facto* void; If the courſe preſcribed by this Act be not obſerved; But only it is ſaid, That before any Grant be paſſed under any of the Kings *S*eals; It ſhall be delivered unto the Kings principal Secretary, or to one of the Clerks of the Signet, to be at the ſaid Office paſſed accordingly, together with a penalty inflicted on the Clerk, that ſhall alter the courſe preſcribed, and no more.

I will offer you an Instance; A *Parson* Marrys a Couple, that may lawfully marry, without any Banes or Licence, and in a private House, and not according to the Canonical Hour; This *Parson*, for acting contrary to the Canons of Holy Church, is lyable to a Suspension, *&c.* But yet the Marriage shall stand good and firm in Law. For *multa sunt, quæ impediunt promovendum quæ non dejiciant jam promotum: Fieri non debuit, sed factum voluit.* So (say I) in the E. of *D*'s Case; If the *Pardon* (which is but a Stamp-*Patent* by Creation) had passed all the Offices, or some or one of them, the Officer, or Officers had peradventure been lyable to a Parliamentary Reprimend, yet notwithstanding the E. of *D*'s Pardon is valid and good in Law, *Contra omnes Gentes.*

To be short, the Rule of Holy Scripture is, in the Case Matrimonial, *Whom God hath joyned together, let no Man put asunder*; So in the Case of Pardons, what his Majesty by His Prerogative-Royal hath Knit together (*viz.* His Mercy and the E. of *D*'s Life,) Let not

not the Lords and Commons endeavour to ſeparate. *Sacrilegii inſtar eſt* (ſays the Civil Law) *divinis obviari beneficiis*, That is to ſay, *Reſcriptis Principum adverſari.*

And as I plead for the E. of *D*'s Pardon, ſo I hope, my *P*lea will not prove a Scandal to others; I am ſure it will not, if they do but conſult *Seneca* in his Controverſies;

*Iniquum eſt* (ſays he) *Collapſis manum non porrigere: Commune hoc jus generis humani eſt, nemo invidioſum jus poſtulat, quod alteri profuturum eſt.*

Thus (Sir) having given you freely my poor Sentiments, touching the E. of *D*'s *P*ardon, I ſhall cloſe my *P*aper with the very ſame words that a late Author uſeth; And they are theſe:

*— I take it for one of the greateſt happineſſes of our Government, That His Majeſty hath an undoubted free Right of granting Pardons as he pleaſes: And for argument of inconvenience, it may as well be urged againſt any Act of Mercy,*

*cy, the King shews; Every Act thereof being as inconvenient to some as it is merciful to others, And therefore hath the King only been Judge in all Ages, when and where he will dispense it, and the People would be in a miserable condition if it were otherwise.*

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# FINIS.

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In the Title Page, in the Quotation of *Bracton*, for *quoondi*, read *judicandi*.

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